



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 24, 2003

Mr. Bernardo J. Garcia
Senior Assistant County Attorney
Harris County Attorney's Office
2525 Holly Hall, Suite 190
Houston, Texas 77054

OR2003-2756

Dear Mr. Garcia:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179937.

The Harris County Hospital District (the "district") received a request for two bid proposals. Although the district does not take a position with regard to the release of the requested information, the district claims that this information may be subject to third party confidentiality claims. Pursuant to section 552.305(d) of the Government Code, the district notified two interested third parties, Enterprise Performance Systems, Inc. ("EPSi") and Kaufman Hall ("Kaufman"), of the district's receipt of the request and of each company's right to submit arguments to this office as to why information relating to each company should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 of the Government Code permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). We have considered the arguments of both third parties and have reviewed the submitted information.

EPSi and Kaufman both contend that portions of the requested information constitute each company's trade secret information that is protected from disclosure under section 552.110(a) of the Government Code. Kaufman also contends that portions of the requested information constitute commercial or financial information the release of which would cause Kaufman substantial competitive harm under section 552.110(b) of the Government Code. The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). We note that if a governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a person's trade secret claim if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.¹ *See* Open Records Decision No. 552 at 5 (1990).

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

¹ The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Based on our review of EPSi's and Kaufman's arguments and the information at issue under section 552.110, we find that portions of this information constitute EPSi's and Kaufman's trade secret information and we have received no arguments that rebut this case as a matter of law. Thus, we conclude that the district must withhold the information that we have marked pursuant to section 552.110(a). We also find that Kaufman has sufficiently demonstrated that the release of the remaining submitted information relating to Kaufman that it claimed to be excepted from disclosure under section 552.110 would cause Kaufman substantial competitive harm. Thus, we conclude that the district must also withhold the entirety of this particular information, which we have marked, pursuant to section 552.110(b). However, we also find that EPSi has failed to present us with a *prima facie* case that the remaining submitted information for which EPSi claims is excepted from disclosure under section 552.110 constitutes EPSi's trade secret information. Accordingly, we also conclude that the district may not withhold any portion of this particular information under section 552.110 of the Government Code.

We now address the remaining submitted information that neither EPSi nor Kaufman argued was excepted from disclosure under section 552.110. We note that e-mail addresses that are contained within each company's remaining submitted information are subject to section 552.137 of the Government Code. Section 552.137 provides in relevant part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Section 552.137 requires the district to withhold e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the district, unless the members of the public with whom they are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. Accordingly, we conclude that the district must withhold the e-mail addresses that we have marked within each company's remaining submitted information pursuant to section 552.137, unless the members of the public with whom they are associated have affirmatively consented to their release.

Finally, we note that portions of the remaining submitted information pertaining to EPSi are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such copies, the member of the public assumes the duty of compliance with the

copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Because we base our ruling on the above-noted exceptions to disclosure, we need not address Kaufman's remaining claim regarding section 552.104 of the Government Code.

In summary, the district must withhold the information that we have marked pursuant to section 552.110(a) and (b) of the Government Code. The district must withhold the e-mail addresses that we have marked within the remaining submitted information pursuant to section 552.137 of the Government Code, unless the members of the public with whom they are associated have affirmatively consented to their release. The district must release the remaining submitted information to the requestor in compliance with applicable copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

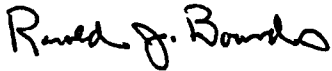
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 179937

Enc. Marked documents

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